

19TH JUDICIAL DISTRICT COURT PARISH OF EAST BATON ROUGE

STATE OF LOUISIANA

NO. 717529

SECTION 24

ROBERT BURNS

VERSUS

COL. LAMAR DAVIS, IN HIS OFFICIAL CAPACITY AND
CUSTODIAN OF RECORDS FOR THE LOUISIANA STATE POLICE

FILED: _____

DEPUTY CLERK

MEMORANDUM REGARDING JUNE 20, 2022 HEARING

MAY IT PLEASE THE COURT:

Defendant, Col. Lamar Davis, in his official capacity and as custodian of records for the Louisiana State Police (“LSP”), submits this opposition memorandum in advance of the scheduled June 20, 2022, hearing in this matter in which Col. Davis has been ordered by the Court to produce two letters to the Court for *in camera* inspection and to explain why the two letters were not produced to the plaintiff, Robert Burns, in response to his public records request by the Court and why Col. Davis should not be taxed with the costs incurred by the plaintiff, Robert Burns, in pursuing this lawsuit.

On January 7, 2022, Burns made a public records request to LSP seeking the personnel file for Trooper Scott Lopez.¹ LSP provided a copy of Trooper Lopez’s personnel file as it existed at that time to Burns on March 8, 2022.² LSP has previously briefed for the Court its reasoning for redacting personal information regarding Trooper Lopez and for redacting Trooper Lopez’s employee performance evaluations, which have been deemed to be protected by the trooper’s right to privacy under Louisiana case law. *See Trahan v. Larivee*, 365 So.2d 294 (La. App. 3 Cir. 1979), and the excerpts cited in LSP’s prior memorandum.

LSP did not produce on March 8, 2022, two documents that Burns asserts in his own recent memorandum to the Court that he “most desires.” The two documents, which are separately being filed with the Clerk of Court under seal as directed by the Court, are (1) a February 24, 2022, Letter of Reprimand issued to Trooper Lopez and (2) an April 12, 2022, Letter of Counseling issued to Trooper Lopez.

¹ Petition for Writ of Mandamus, par. 36.

² *Id.*, par. 37.

Letter of Reprimand:

With respect to the February 2022 letter of reprimand, this document represents discipline which would be placed in a trooper's personnel file once the discipline is deemed final. Although the letter was issued on February 24, 2022—after the public records request was submitted by Burns but before LSP provided its response—the discipline was not *final* as of March 8, 2022, because Trooper Lopez had a right to appeal the reprimand to the Louisiana State Police Commission. LSP attaches Chapters 12 and 13 of the rules of the Louisiana State Police Commission for the Court's reference as Exhibit "A." Rule 12.8(a)(3) requires any written notice of discipline to contain a notification informing a trooper that "You have the right to appeal this action to the State Police Commission. The time limits and procedure for appealing are contained in Chapter 13 of the State Police Commission Rules." This notice was provided in the February 24, 2022, letter issued to Trooper Lopez. Rule 13.3(a)(1) provides that an appeal may be filed within thirty (30) calendar days after the date on which a trooper received written notice of the proposed discipline. Trooper Lopez signed for and confirmed receipt of the Letter of Reprimand on March 2, 2022; per State Police Commission Rules, he could have appealed the reprimand at any time before April 1, 2022. The discipline was thus not final as of March 8, 2022, and as of that date was not included in the personnel file produced to Burns.

Moreover, Louisiana constitutional and statutory law—not just State Police Commission Rules—prohibited LSP from producing the Letter of Reprimand before the discipline was final. The State Police Commission is created under the Louisiana Constitution. Article 10, Section 46(A) of the Louisiana Constitution provides that a classified state police officer subjected to discipline (which is required to be in writing) has a right of appeal to the State Police Commission. La. R.S. 40:2533—enacted by the Louisiana legislature with respect to law enforcement agencies in general—further addresses the issue of whether disciplinary action must be placed in a law enforcement officer's personnel file such that it be subject to a public records request. R.S. 40:2533(B) allows an officer a period of thirty days within which to submit a written response. R.S. 40:2533(D) requires only "sustained complaints against [a] law enforcement officer" to be placed in a personnel file for at least ten years, "***but only after the officer has exhausted all administrative appeals to which he is entitled.***" La. R.S. 40:2532 additionally provides that no person shall publicly release any information "with respect to an investigation of the law enforcement officer" if the information "may be deemed otherwise

confidential.” The Public Records Act, through La. R.S. 44:4.1(26), specifically lists R.S. 40:2532 as an exception to the ordinary rules applicable to public records. The State Police Commission rule regarding appeal rights and finality of discipline is entirely consistent with statutory law applicable to law enforcement agencies in general and thus does not violate the Public Records Act.

Trooper Lopez did not appeal the Letter of Reprimand, and therefore the discipline was not deemed final and could not be placed in his personnel file prior to **April 2, 2022**. Had Burns made his public records request on or after April 2, 2022, the Letter of Reprimand would have been included in the documents produced to him.

LSP does not represent to the Court that this document is not a public record; instead, its position is that the document was not a public record *at the time that Burns filed his public records request or the time that LSP responded to his public records request*. LSP therefore did not violate the Public Records Act by failing to produce the letter on March 8, 2022, in response to a public records request for the personnel file because the letter was not part of the personnel file at that time. Nor was the discipline final and part of the personnel file when Burns represents that he requested Trooper Lopez’s “disciplinary file” on March 17, 2022. Although LSP has no objection to the document being produced to Burns now—indeed, the document would be responsive to Burns’ public records request if he made it today instead of in January 2022—the production of this document after LSP had already properly responded to a public records request should not result in a finding that Burns “prevails” in this suit under La. R.S. 44:35 or that he should be entitled to any fees or other costs incurred in this litigation. LSP properly produced the personnel file as it existed at that time. The Court should deny any request by Burns for costs associated with this litigation because LSP did not fail to do what it was legally required to do under the Public Records Act.

Letter of Counseling:

On April 12, 2022, LSP Troop I Captain Beau Comeaux issued a “Letter of Counseling” to Trooper Lopez related to comments that the trooper made at a St. Martin Parish Planning and Zoning Committee Meeting which were unrelated to his duties as a Louisiana State Police Trooper. As noted in the letter, Captain Comeaux advised Trooper Lopez that “this letter of counseling is not a disciplinary action. This letter will be maintained in your supervisory file and other files, but this letter will not be accessible to the public unless and until it is used to support

future discipline.” This is consistent with State Police Commission Rule 12.9, which states that a letter of counseling is not a disciplinary action which allows a trooper to appeal rights and which is not placed in the personnel file.

On its face, LSP clearly could not have produced a letter authored on April 12, 2022, at the time it produced records on March 8, 2022. But in contrast to the Letter of Reprimand, LSP does continue to assert that the Letters of Counseling is a confidential, non-public document which should not be produced to the public.

While Burns facetiously argues to the Court that LSP is not required to adhere to the rules of the State Police Commission—an independent commission created in the Louisiana Constitution with the power to oversee LSP—the Legislature through the enactment of the Police Officers’ Bill of Rights also specifically limited what is required to be maintained in the public personnel file of any law enforcement officer. As noted, La. R.S. 40:2533(D) only requires that “sustained complaints” be placed in a personnel file for a limited period of time. By implication, that statute allows law enforcement agencies such as LSP to exclude anything other than “sustained complaints”—i.e., formal discipline—from a publicly available personnel file. A letter of counseling is analogous to a supervisory tool used to monitor employee performance, such as the performance evaluations that existing case law allows to be excluded from a public personnel file based on an employee’s constitutional right to privacy. No complaint requesting “discipline” was sustained through the letter of counseling; it is therefore a document that the Legislature specifically allows to be excluded from a public personnel file under La. R.S. 40:2533.

Case law further supports that a law enforcement officer has a “right to privacy” involving complaints which have nothing to do with actions performed in the course of duty as a law enforcement officer. In *City of Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 2007-CA-1088 (La. App. 1 Cir. 10/10/08), 4 So.3d 807, the First Circuit held that La. R.S. 40:2532 embodies a law enforcement officer’s “reasonable expectation of privacy” and granted the chief of police of the Baton Rouge Police Department “considerable discretion” to determine what information is confidential. *Id.* at 819. The Court distinguished the “work-related conduct” of public employees from actions which are “clearly private in nature[.]” *Id.* at 820-21. The Letter of Counseling issued to Trooper Lopez on its face concerns comments which are not “work-related” and may therefore be deemed confidential by LSP.

CONCLUSION

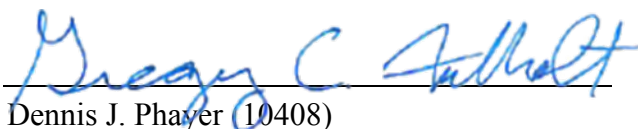
The Letter of Reprimand issued to Trooper Scott Lopez was not formally placed in his personnel file some time after April 2, 2022, based not only on State Police Commission Rules but on the Police Officers' Bill of Rights enacted by the Louisiana Legislature. LSP does not object to the production of this letter to Burns *now* but submits that the production of the letter cannot allow Burns to "prevail" in this suit when LSP properly withheld the letter in its production of documents in March 2022.

The Letter of Counseling issued to Trooper Lopez is not "discipline" which should be placed in his public personnel file under Louisiana State Police Commission Rules or under La. R.S. 40:2533. LSP requests that the Court, after its *in camera* review of the letter, decline to order LSP to produce the letter to Burns. LSP further submits that Burns again cannot "prevail" in his suit based on an alleged failure to LSP to produce a document which did not exist when the initial public records request was made, when LSP provided its response to the request, or even when Burns filed the instant lawsuit.

Col. Davis prays that the Petition for Mandamus be denied and that Burns' request for costs associated with the filing of the Petition for Mandamus be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing pleadings on all parties to these proceedings by email, facsimile transmission and/or United States Mail, postage prepaid, this 10th day of June, 2022.



GREGORY C. FAHRENHOLT